Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 51

January 1997

Only When They're Bad: The Rights and Responsibilities of Our Children

Jacqueline Cuncannan

ONLY WHEN THEY'RE BAD: THE RIGHTS AND RESPONSIBILITIES OF OUR CHILDREN

INTRODUCTION

"Juvenile Justice Grows Up."[1] "It's Not a Slap on Wrist."[2] "New Law to Crack Down on Juveniles."[3] These headlines from St. Louis newspapers ushered in Missouri's new juvenile crime law with promises to be tough on crime.[4] Like an increasing number of states, Missouri is responding to the problem of juvenile crime by making it easier for juvenile courts to waive[5] jurisdiction and prosecute children

1. Nordeka English, *Warning: Juvenile Justice Grows Up; 'It's Not a slap on Wrist,' Judge Tells Forum Audience*, METRO ST. CHARLES POST, Sept. 5, 1995, at 1C.

2. *Id.*

3. Martha Shirk, *New Law to Crack Down on Juveniles; Backers Seek to Deter Crime; Some Officials Fear Workload*, ST. LOUIS POST-DISPATCH, Aug. 27, 1995, at 1A.

4. Mark Schlinkmann & Kim Bell, *Carnahan Signs Juvenile Crime Bill; Allows Trial as Adults in Serious Cases*, ST. LOUIS POST-DISPATCH, June 13, 1995, at 1B. Missouri Governor Mel Carnahan commented on the new laws: "Now, these teen-agers will know that there is a risk, and it is real time in a real prison." *Id.*

5. Judicial waiver is the process by which a juvenile judge decides to transfer a case to adult criminal court. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 85 (1995). Judicial waiver is the most common method of getting a minor into adult criminal court. *Id.* The judicial waiver procedure involves a hearing in which the juvenile judge evaluates a number of factors, such as the child's age and the seriousness of the crime, to determine whether to try the child in juvenile court or transfer him to a court of general jurisdiction. *Id.*

There are two other ways in which a minor may end up in criminal court: prosecutorial discretion and statutory exclusion. *Id.* Prosecutorial discretion refers to the authority of the state prosecutor to decide whether to file charges in juvenile or criminal court. *Id.* at 87. Only a few states allow this type of transfer. *Id.* Statutory exclusion refers to the process of legislatively excluding minors from juvenile court. *Id.* at 88. This exclusion is usually based on the age of

as adults.[6] Recent amendments to the Missouri juvenile code reflect a growing dissatisfaction with the traditional operation of the state's juvenile justice system.[7]

---

the minor (for example, excluding everyone over age 16 from juvenile jurisdiction) or is based on the seriousness of the offense (for example, excluding murder or other serious offenses against the person from juvenile jurisdiction). *Id.*

6. Missouri State Senator Joe Moseley explained the rationale for the new amendments: "[The new amendments] will make it clear to juveniles that they're going to be held accountable for their behavior. I think it's going to get their attention." Shirk, *supra* note 3, at 1A. State Representative Phil Smith commented that law "ensure[s] that those juveniles who do commit violent crimes are punished accordingly." *Id.*

7. MO. REV. STAT. § 211.071.1 (1996). Missouri's new amendments make a number of significant changes. The amendments particularly relevant to this Note are changes made to waiver guidelines. For example, the age at which a child charged with any crime may be subjected to a waiver hearing, at the court or the prosecution's discretion, has been lowered from 14 to 12 years old. *Id.* The amendments also eliminate any minimum age requirement for ordering a waiver hearing when a child is charged with one of the "seven deadly sins" (first degree murder, second degree murder, assault, rape, sodomy, robbery and distribution of drugs), or when a child has committed two prior felonies. *Id.* If a child fits into one of these two categories, the waiver hearing is mandatory. *Id.* The Missouri legislature also amended the criteria a juvenile court must consider when deciding whether or not to waive jurisdiction. Juvenile courts must now consider ten factors during a waiver hearing:

> (1) the seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction; (2) whether the offense alleged involved viciousness, force and violence; (3) whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted; (4) whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code, (5) the record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements; (6) the sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living; (7) the age of the child; (8) the program and facilities available to the juvenile court in considering disposition; (9) whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court; and (10) racial disparity in certification.

MO. REV. STAT. § 211.071.6 (1996). Compare Missouri's factors with the criteria suggested by the Supreme Court in Kent v. United States, 383 U.S. 541, 566-67 (1966), discussed *infra* note 54.

Although the list of factors used to determine whether to waive jurisdiction includes consideration of both the gravity of the offense and the child's "amenability to rehabilitation," MO. REV. STAT. § 211.071.6 (1996), it remains to be seen whether the courts will give equal weight to each element. The current law does not require that each factor be given equal weight. *Id.* In addition, it is not entirely clear what "amenability to rehabilitation" means. *See* Edward P.

The trend in state juvenile law towards prosecuting juveniles as adults raises a number of questions: Why is there a separate juvenile justice system and what is its intended function? Should minors who commit crimes be treated the same as adults? If delinquent juveniles are treated as adults, then what are the implications for the treatment of non-delinquent children?

These are not novel questions.[8] Current state trends towards increasing criminal accountability,[9] however, have shifted the focus

---

Mulvey, *Judging Amenability to Treatment in Juvenile Offenders*, *in* CHILDREN, MENTAL HEALTH, AND THE LAW 195, 200 (N. Dickon Reppucci et al. eds., 1984) ("[T]he amenability determination is difficult to isolate in operational terms."); Abbe Smith, *They Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953, 1012 (1995) ("What does it mean for a juvenile not to be 'amenable to rehabilitation within the juvenile justice system'?"). Indeed, the fact that an age minimum has been eliminated for violent crimes suggests that the gravity of the offense may be the determining factor in a waiver decision.

8. The United States Supreme Court specifically addressed the function of juvenile courts almost thirty years ago. *See In re* Gault, 387 U.S. 1 (1967). The Court recognized that under the then-current application of juvenile justice, a child received none of the Constitutional protections that adults were given. *Id.* at 17. The Court also noted that children were not getting the benevolent rehabilitation envisioned for the juvenile court system. Justice Fortas noted that: "[A child in the juvenile court system] receives the worst of both worlds . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Id.* at 18 n.23 (quoting Kent v. United States, 383 U.S. 541, 556 (1966)). Stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," *id.* at 13, and "the condition of being a boy does not justify a kangaroo court," *id.* at 28, the Court proceeded to establish the basic adversarial rights guaranteed to juveniles under the Due Process Clause of the Fourteenth Amendment. *Id.* at 31-57. The Court held that a minor has a Constitutional right to notice of the charges against him, a right to counsel, a privilege against self-incrimination, and a right to cross-examination. *Id.*

See also Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (deciding whether the execution of a 15 year old boy is constitutional); Parham v. J. R., 442 U.S. 584, 606-17 (1979) (addressing whether a child is entitled to an adversarial hearing before being committed to a psychiatric hospital). *See also* John E. Coons et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. REV. 307 (1991) (addressing when childhood begins and ends, and the duties and responsibilities of children).

9. For at least the last 70 years, a significant number of states have allowed transfers of juveniles to criminal court. SNYDER & SICKMUND, *supra* note 5, at 85. But the traditional process by which juveniles were transferred was an individualized, case-by-case determination. *Id.* In the last 20 years, the process has moved toward a generalized determination based on the age of the offender and/or the seriousness of the offense. *Id.*

According to national statistics compiled in 1994, at least 25 states allow judicial waiver of juvenile jurisdiction by age 14, although there is tremendous variation among the states regarding the minimum age and process through which waiver occurs. NEAL MILLER, U.S. DEP'T OF JUSTICE, STATE LAWS ON PROSECUTORS' AND JUDGES' USE OF JUVENILE RECORDS

of juvenile justice systems from rehabilitation to punishment.[10] Implicit in this trend is a growing acceptance of the idea that adolescents[11] possess sufficient competence and legal capacity[12] to be held criminally responsible.

While this trend in juvenile law flourishes, non-delinquent youth are still presumed to lack the level of competence necessary to exercise the same legal rights as adults.[13] Although different policy considerations account for this disparity,[14] the result is that the law holds minors criminally responsible while denying them many legal rights outside the area of delinquency.

This Note examines the current state trend toward higher accountability for delinquents, with the implicit presumption of competence, and compares this trend to areas of law in which adolescents are still presumed to be incapable of independent decisionmaking. Part I examines the historical context in which the separate juvenile justice system was created and its original philosophy and function. Part II provides a brief overview of the current legal status of minors and discusses the inconsistent legal

---

13-14 (1995). In the last two years, 10 more states have lowered the minimum age for waiver of juvenile jurisdiction to 14 years old. *ABC World News Tonight* (ABC television broadcast, Jan. 30, 1996) [hereinafter *World News*]. For an analysis of the problems involving the access and effectiveness of counsel resulting from the recent trends in juvenile law reform, see generally PATRICIA PURITZ, AMERICAN BAR ASSOC. JUVENILE JUSTICE CENTER, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (1995).

10. By 1990, at least 25 states had "to protect society" as their stated purpose for their youth corrections statutes while only 11 states had the goal of meeting the needs of delinquent youth. SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE 35 (1996).

11. Because states are allowing waiver of juvenile jurisdiction for younger offenders, children, in addition to adolescents, now face greater legal responsibility. *See, e.g.*, MO. REV. STAT. § 211.071(1) (1996) (requiring that a child of *any* age undergo a waiver hearing if charged with a serious violent crime).

12. For the purposes of this Note, "capacity" refers to the "mental ability to understand the nature and effects of one's acts." BLACK'S LAW DICTIONARY 207 (6th ed. 1990).

13. *See infra* notes 86-94 and accompanying text.

14. *See infra* notes 62-76 and accompanying text.

approach to delinquent and non-delinquent youth. Part III discusses the issue of competence and its relevance in affording legal rights and responsibilities to children. Finally, Part IV proposes that a rebuttable presumption of competence be established for all children over the age of fourteen, whether or not they are delinquent.

I. THE HISTORY OF CHILDREN'S RIGHTS AND JUVENILE LAW

At common law, once a child reached the age of criminal responsibility, he was treated the same as an adult for the purposes of punishment and accountability for criminal activity.[15] The age of criminal responsibility was quite young, generally seven years old.[16] After the age of seven, courts did not recognize any diminished capacity or responsibility on account of an offender's young age.[17]

At the same time, common law gave parents almost total authority over their children, excluding even state intervention concerning children.[18] This distribution of authority reflected the notion that children were the property of their parents, lacking any personal identity and possessing little value.[19]

---

15. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

16. *Id.* If found guilty, children this young could be sentenced to prison or even subjected to the death penalty. SNYDER & SICKMUND, *supra* note 5, at 70.

17. Mack, *supra* note 15, at 106.

> [The state] did not aim to find out what the accused's history was, what his heredity, his environments, his associations; . . . It put but one question, 'Has he committed this crime?' It did not inquire, 'What is the best thing to do for this lad?' It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act; not by the needs of the boy, not by the needs of the state.

Id at 107.

Even though children were held responsible for criminal acts, they were considered incapable of the rationality necessary to hold other rights. *See* Katherine H. Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 987 (1993) (discussing capacity as related to children's rights).

18. Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 CAL W. INT'L L.J. 193, 198 (1994).

19. *Id.* at 199 ("[Children] were fundamentally on par with animals and slaves.").

The industrialization of the United States altered the traditional roles within the family, the role of the family within society, and society's overall view of childhood.[20] One societal response to industrialization was the development of the Progressive Movement.[21] The Progressive Movement initiated many social reforms, including changes in the criminal justice system.[22] The Progressives adopted a Positivist theory that focused on reducing crime by eliminating the underlying causes of criminal behavior rather than by attempting to deter potential offenders with harsh punishments.[23]

In addition to this ideological shift with respect to crime and criminals, the Progressive Movement also marked the evolution of societal attitudes concerning childhood and children.[24] The belief that children were merely the property of their parents gave way to the view that children were developing human beings whose successful transition to adulthood largely depended on proper care and attention from their parents.[25] By the turn of the nineteenth century, the societal view of children evolved to the point where children were considered a special class in need of protection and guidance.[26] Society viewed

---

20. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 822 (1988) [hereinafter Feld I].

21. *Id.* at 823.

22. *Id.*

23. *Id.* at 824. Professor Feld defines Positivism as the "effort to identify the antecedent variables that cause crime and deviance." *Id.* This approach to crime reduces the moral responsibility of the actor by focusing on external forces that caused the actor to act, rather than focusing on the actor's conscious choice to act. *Id.* Professor Feld notes that the creation of a distinct juvenile justice system that emphasizes benevolent treatment and guidance was a natural result of this ideological evolution. *Id.*

24. Levesque, *supra* note 18, at 199-200.

25. *Id.* Some scholars refer to this period as the "child-saving era." *Id.* at 199. Other scholars refer to it as the "Progressive Movement." Jennifer D. Tinkler, Note, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child*, 12 B.C. THIRD WORLD L.J. 469, 476 (1992).

26. Levesque, *supra* note 18, at 199-200. During this era, society viewed children as vulnerable and malleable and expected parents to assume responsibility for educating and raising their children. *Id.* at 199. The anticipated result was that society as a whole would benefit from parents' investment in children. *Id.* at 200. In addition to juvenile delinquency, the

delinquent behavior as a sign that the needs of children were not being adequately satisfied.[27] In this way, society's view of childhood and criminal responsibility shifted away from holding all children above the age of seven criminally responsible for their actions.[28]

Consistent with the Progressive Movement, reformers pushed for the special treatment of children who were accused of criminal activity.[29] This effort eventually resulted in the creation of a separate legal system for juveniles, the juvenile court.[30] The goal of the creators of juvenile courts was to remove children from the adult court system, which focused on individual responsibility and punishment for criminal behavior.[31] Reformers envisioned a separate legal system for juveniles in which judges acknowledged that children were different from adults and in need of nurturing and

---

so-called "child-savers" focused their reform efforts on child labor laws and compulsory education. *Id.* For a thorough discussion of the "child-savers'" contribution to the reform of juvenile justice, see ANTHONY M. PLATT, THE CHILD SAVERS (1969).

27. Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 325 (1991) ("Delinquency was viewed as an illness brought on by the social diseases of poverty, parental neglect, ignorance and urban decay.").

28. *Id.* "[T]he causes of crime did not lie within the will of the individual—especially not within an individual whose moral code was only partially informed." *Id.*

29. Mack, *supra* note 15, at 109. During the period of time that children began to receive special treatment, another new concept, adolescence, entered American society. Levesque, *supra* note 18, at 200. Before the "child-saving era," a child in his teens enjoyed the status of an adult. *Id.* However, after society acknowledged adolescence as a distinct developmental period in a person's life, adolescents were lumped together with children. *Id.* Accordingly, society viewed adolescents as still in need of the guidance and protection of their parents. *Id.*

30. COMMITTEE ON CHILD PSYCHIATRY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOW OLD IS OLD ENOUGH?, THE AGES OF RIGHTS AND RESPONSIBILITIES 39 (1989) [hereinafter HOW OLD IS OLD ENOUGH?]. Chicago is considered the "birthplace of juvenile justice." *Id.* at 40. The first juvenile court in this country was established in 1899, in Cook County, Illinois. *Id.* at 39. The purpose of the new juvenile court was to guide and protect children by removing them from adult proceedings. *Id.*

The creation of the juvenile court system reflected a new understanding of children and their legal capacities. *See supra* note 26. The basis of this new understanding under which children needed special protection, rested on children's incapacity to be rational and their inability to make competent decisions. Federle, *supra* note 17.

31. Forst and Blomquist, *supra* note 27, at 324.

guidance to correct their delinquent behavior.[32] Operating under the concept of *parens patriae*,[33] juvenile courts attempted to determine what was in a child's best interest and provide the appropriate rehabilitative treatment.[34] Because the judge acted as the child's guardian and focused on protecting and rehabilitating the child, juvenile proceedings were no longer conducted like traditional criminal proceedings.[35] Instead, the nature of the proceedings changed from criminal to civil, and, because of the court's role as the child's guardian, the proceedings were intended to be non-adversarial.[36]

The juvenile court was supposed to rely upon psychological evaluations and social assessments to determine the causes of delinquent behavior and the proper treatment for children brought before the court.[37] The court was not to give consideration to the particular criminal acts committed by the children when determining the intensity or duration of their treatment.[38] Because treatments were

---

32. *Id.*

33. Literally, *parens patriae* means "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). The term is used to refer to the state's responsibility to "care for persons who are unable to care for themselves or whose families are unable to care for them." Forst & Blomquist, *supra* note 27, at 325. Interestingly, by asserting its *parens patriae* authority to act as the delinquent child's guardian and prescribe some rehabilitative measures, the state necessarily implies that the child's parents have failed as proper guardians. *See* Mack, *supra* note 15, at 109 ("[Juvenile p]roceedings are brought to have a guardian or representative of the state appointed to look after the child, to have the state intervene between the natural parent and the child because the child needs it, as evidenced by some of its acts, and because the parent is either unwilling or unable to train the child properly.").

34. Operating under the doctrine of *parens patriae* also made it possible for juvenile courts to address the needs of children who had committed "noncriminal offenses," such as not minding their parents. ALBERT R. ROBERTS, JUVENILE JUSTICE: POLICIES, PROGRAMS, AND SERVICES 58 (1989).

35. Feld I, *supra* note 20, at 971. Juvenile proceedings were very informal and the court attempted to avoid any stigma of a criminal proceeding by using a "euphemistic vocabulary." *Id.*

36. Forst & Blomquist, *supra* note 27, at 328. *See also In re* Gault, 387 U.S. 1, 16-17 (1967) (describing the original civil nature of the juvenile justice system and its gradual criminalization).

37. Feld I, *supra* note 20, at 825.

38. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law*

based primarily on factors other than the delinquent behavior itself, children who committed criminal acts of a similar nature could be subjected to widely varying treatments, ranging from court supervision to institutionalization for the duration of their minority status.[39] The juvenile court's goal was to assess the progress of each child on an individualized basis when determining whether he was ready for release from supervision.[40]

Because the juvenile court was meant to be individualized, non-adversarial, and civil in nature, none of the procedural safeguards found in criminal proceedings were required in delinquency proceedings.[41] Specifically, in spite of the benevolent intentions of the creators of the juvenile courts, juvenile dispositions were often very severe and punitive.[42] Broad judicial discretion led to gross inequalities in the forms and duration of interventions ordered for juveniles.[43] These inequalities were particularly disturbing considering the fact that the initial purpose of broad judicial discretion was to create a more understanding system for children.[44] The lack of procedural safeguards, coupled with this broad judicial discretion, prompted critics of the juvenile courts to call for reform.[45]

Reform, 79 MINN. L. REV. 965, 971 (1995) [hereinafter Feld II].

39. *Id.*; Forst & Blomquist, *supra* note 27, at 326.

40. Forst & Blomquist, *supra* note 27, at 326.

41. Feld II, *supra* note 38, at 971. *See also* Mack, *supra* note 15, at 109-14 (discussing early attempts to address the failure of the juvenile court's ability to live up to the court's stated rehabilitative goals).

42. Forst & Blomquist, *supra* note 27, at 328.

43. *Id.*

44. *Id.*

45. *Id.* at 328-29. *See also* ROBERTS, *supra* note 34, at 72-3 (discussing how the juvenile court system failed to live up to the envisioned goals of compassionate rehabilitation). The Supreme Court answered this call when it began addressing whether and what kinds of procedures a delinquent is due. *See* Kent v. United States, 383 U.S. 542, 560 (1966) (holding that a minor is entitled to procedural due process when the state attempts to waive juvenile jurisdiction and try him as an adult); *Gault*, 387 U.S. at 4 (holding that a minor facing juvenile adjudication is entitled to procedural due process).

II. THE CURRENT LEGAL STATUS OF CHILDREN

The legal status of children today is a confusing accumulation of inconsistencies. The Supreme Court has recognized that minors possess certain constitutional rights in some contexts, but not in others.[46] Likewise, individual states commonly mandate that juveniles attain a minimum age before certain rights are available. However, there is no consistency between the age at which minors are granted these rights and the age at which minors will be held criminally responsible for delinquent actions.[47]

A. *Constitutional Protections for Minors*

The Supreme Court has spoken on a number of issues regarding the rights the Constitution guarantees to children.[48] As the Court attempts to balance the interests of parents, the state, and the individual child, there is no clear understanding of the constitutional status of minors.[49] The Court tends to keep issues regarding the rights of minors within the juvenile justice system separate from issues relating to the rights of minors outside the context of delinquency proceedings.[50]

The Supreme Court's first significant recognition of a delinquent juvenile's right to some basic due process protection occurred in *Kent v. United States*.[51] In *Kent*, the Court held that juveniles are entitled to a hearing before a juvenile court can waive juvenile jurisdiction.[52]

---

46. *See infra* notes 48-76 and accompanying text.

47. *See infra* notes 77-82 and accompanying text.

48. *See infra* notes 51-76 and accompanying text.

49. Levesque, *supra* note 18, at 202.

50. *See infra* notes 51-76 and accompanying text.

51. 383 U.S. 541 (1966).

52. *Id.* at 560. *Kent* involved a 16-year-old-boy with a prior juvenile record who was charged with housebreaking, robbery, and rape. *Id.* at 543-44. Despite the defense counsel's request, the juvenile court judge did not allow the defense counsel access to the boy's Social Service file. *Id.* at 546. The judge also did not hold a hearing or make any findings of fact before ruling that he was waiving jurisdiction of the boy and directing that the boy be tried as

The Court also stated that a juvenile facing a jurisdictional waiver hearing has the right to have his counsel examine the social records upon which the juvenile court will base its waiver decision.[53] Furthermore, the Court noted that the juvenile court must conduct a full investigation and offer a statement of the specific reasons for the transfer, demonstrating that the investigation was thorough.[54]

One year later, in *In re Gault*,[55] the Court enhanced the procedural protections available to juveniles. After reviewing the original purposes of creating a separate juvenile court system, the Court acknowledged that despite the good intentions underlying the non-adversarial, *parens patriae* approach to juvenile offenders, the result of such an approach was inaccurate and unfair dispositions.[56] The Court then held that juveniles charged with committing delinquent

---

an adult in a court of general jurisdiction. *Id.*

53. 383 U.S. at 562.

54. *Id.* at 561. The Court endorsed a list of determinative factors that a juvenile court should consider when deciding whether or not to waive jurisdiction over a minor. *Id.* at 566-67. These factors include: (1) the seriousness of the offense and whether the waiver of jurisdiction is necessary for the safety of the community; (2) whether the offense "was committed in an aggressive, violent, premeditated or willful manner"; (3) whether the offense was committed against persons; (4) the weight of the evidence against the minor; (5) the importance of adjudicating multiple complaints in one proceeding when the juvenile's associates are adults; (6) the maturity of the child (as determined by a social assessment); (7) the record of the minor, including any previous law enforcement or juvenile court contacts; and (8) the likelihood that the minor can be rehabilitated. *Id.*

While these guidelines suggest that some measure of fairness and consistency exists among states regarding the transfer of juveniles to criminal court, commentators point out that "the Court has not struck down any waiver legislation containing such vague phrases as 'amenability to treatment,' 'dangerousness,' 'protection of the public,' 'best interests of the public welfare,' or the nature of the youth's 'family, school and social history.'" Forst & Blomquist, *supra* note 27, at 338.

55. 387 U.S. 1 (1967). *Gault* involved a 15-year-old boy accused of making a lewd phone call. *Id.* at 4. The Juvenile Court Judge committed the boy to the State Industrial School until age 21. *Id.* at 7. The minor's parents were never notified of their son's detention and no appeal was permitted under state law. *Id.* at 5. Furthermore, the boy was found guilty based on the pure discretion of the judge and on the boy's reputation rather than any evidence or proof. *Id.* at 9.

56. *Id.* at 19. The Court recognized that a juvenile court judge's "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.* at 18.

acts are entitled to basic due process protections.[57]

After *Gault*, other Supreme Court decisions further elaborated on the extent of procedural due process protection available to juveniles. Specifically, the Court declared that the burden of proof in a juvenile delinquency proceeding is the "beyond a reasonable doubt" standard,[58] that juveniles are entitled to protection from double jeopardy,[59] and that minors are competent to waive their rights and confess to committing crimes without first consulting an attorney.[60] These decisions indicate that the Supreme Court has moved away from a pure *parens patriae* approach and toward treating juveniles

---

57. *Id.* at 13. *See also supra* note 8 (discussing the due process rights specifically addressed by the Court).

58. *See In re* Winship, 397 U.S. 358, 368 (1970). *Winship* involved a twelve-year-old boy charged with purse-stealing. *Id.* The trial court convicted the boy on a "preponderance of the evidence" standard. *Id.* at 360. The Supreme Court reversed and held that "the constitutional safeguard of proof beyond a reasonable doubt" is as important during the adjudicatory stage of a delinquency proceeding as is "the notice of charges, the right to counsel, the right of confrontation and examination, and the privilege against self-incrimination." *Id.* at 368. The Court rejected the notion that a civil label meaningfully distinguished a juvenile "conviction" from a criminal one. *Id.* at 360. The court focused on the loss of liberty involved and on its recognition of a minor's due process rights in the *Gault* decision. *Id.*

59. Breed v. Jones, 421 U.S. 519, 541 (1975). *Breed* involved a minor who was charged with armed robbery. *Id.* at 521. The juvenile judge found the allegations in the petition were true and subsequently moved to transfer the juvenile to criminal court. *Id.* at 523-24. In criminal court, the minor was again found guilty of armed robbery. *Id.* at 525. The Supreme Court held that this violated the Double Jeopardy protection of the Fifth and Fourteenth Amendments. *Id.* at 531. In its decision, the Court focused on the risk of a deprivation of liberty involved in both proceedings, and rejected the argument that the juvenile proceeding was merely civil in nature. *Id.* at 529.

60. Fare v. Michael C., 442 U.S. 707, 727 (1979). *Fare* involved a 16-year-old boy that police arrested on suspicion of murder. *Id.* at 709-10. When questioned by the police, the boy asked to see his probation officer. *Id.* at 710. After the police denied the boy's request to see his probation officer, he proceeded to give a confession without an attorney present. *Id.* at 710-11. At his trial, the boy moved to have the confession suppressed on the grounds that the police violated his *Miranda* rights when the police denied his request to see his probation officer. *Id.* at 711-12. The Supreme Court held that a request to see a probation officer is not necessarily the equivalent of invoking one's Fifth Amendment right to remain silent. *Id.* at 723. Rather, the Court stated that whether this right was invoked must be determined from the totality of the circumstances. *Id.* at 724-25. Because the police in *Fare* advised the boy of his right to an attorney and the boy declined, and because the boy was familiar with the system, the Court held that the boy knowingly and intelligently waived his *Miranda* rights. *Id.* at 725-27.

like adult criminal defendants.[61]

Unlike its approach to the legal status of delinquent minors, the Supreme Court's approach to the legal status of non-delinquent minors has been inconsistent. The Court has held that minors are entitled to certain constitutional rights outside the context of delinquency proceedings, such as the rights to free speech and privacy, however, it has refused to extend these rights universally.[62] Areas in which the Court has addressed the constitutional status of minors include school activities[63] and discipline,[64] abortion rights,[65] and the civil commitment of minors to psychiatric facilities.[66] The Court's inconsistent rulings concerning the rights of non-delinquent children are highlighted by the fact that while parents' interests are rarely, if ever, considered in the context of delinquent children's rights, parental interests often receive strong consideration when the Court is addressing the constitutional rights of non-delinquent children.[67]

The Court's recognition of the constitutional rights of minors in

---

61. *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that the Constitution does not guarantee a jury trial to a minor undergoing a juvenile court proceeding). *See also* Thompson v. Oklahoma, 487 U.S. 815, 830, 838 (1988) (holding that the Eighth and Fourteenth Amendments prohibit the execution of a convicted murderer who was 15 years old when he committed the murder because doing so would "offend civilized standards of decency"). *But cf.* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the execution of a 16-year-old convicted murderer does not constitute cruel and unusual punishment).

62. *See infra* notes 68-76 and accompanying text.

63. *See infra* note 68 and accompanying text.

64. *See infra* notes 69-70 and accompanying text.

65. *See infra* notes 71-74 and accompanying text.

66. *See infra* notes 75-76 and accompanying text.

67. The inconsistency in the Court's decisions may result from the fact that when addressing children's constitutional rights outside the context of criminal activity, the Court must also take into consideration the rights of parents to raise their children as they see fit. *See* Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 581 (1992) ("[C]ourts will, whenever possible, defer to parental authority and preserve the privacy that has come to be expected by families."); Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 714 (1992) ("Courts are generally unwilling to intrude on intra-familial conflicts unless significant thresholds are crossed. . . .").

the school environment is varied. For example, the Court recognized a minor's First Amendment right to free speech at schools.[68] The Court also recognized a student's right to some procedural due process protection when faced with suspension, holding that the student must receive notice of charges and be given an opportunity to be heard.[69] The Court also held, however, that the use of corporal punishment in public schools does not violate any constitutional rights of minors and does not require procedural due process.[70]

The Court has also struggled with a bright line rule regarding a minor's rights to obtain an abortion. For example, in *Planned Parenthood of Central Missouri v. Danforth*,[71] the Court upheld a

---

68. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969). In holding that a school district could not prohibit junior high and high school students from wearing black armbands to protest the Vietnam war, the Court stated: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The Court further stated that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ." *Id.* at 511. *See also* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (refusing to permit the state to compel students to salute the flag because it would constitute a violation of the students' First Amendment rights). But compare the *Tinker* court's recognition of a student's First Amendment rights to Free Speech with Ginsberg v. State of New York, 390 U.S. 629, 637 (1968) (holding that a New York law prohibiting the sale of obscene materials to minors under the age of seventeen does not infringe upon minors' constitutionally protected freedom of expression).

69. Goss v. Lopez, 419 U.S. 565, 581 (1975). This case involved nine public high school students who were suspended from school without a hearing. *Id.* at 569-70. The Supreme Court rejected the state's argument that the students did not have a constitutional right to a hearing. *Id.* at 572-73. The Court reasoned that the students had a property interest in their public education that was protected by the Due Process clause. *Id.* at 573-74. Furthermore, the Court noted that the students had a liberty interest at stake because of the potential for damage to their reputations. *Id.* at 574-75. Accordingly, the Court declared that the students were entitled to notice of the charges against them and an opportunity to be heard. *Id.* at 581.

70. Ingraham v. Wright, 430 U.S. 651, 682 (1977). In *Ingraham*, a group of junior high school students alleged that the use of corporal punishment violated that Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 653. The paddling at one particular school in the district was so severe that one student suffered a hematoma while another student lost full use of his arm for a week. *Id.* at 657. The Court held that the Eighth Amendment was inapplicable to corporal punishment used in public schools because the Eighth Amendment was intended to address excessive punishment in regard to criminal conviction and incarceration. *Id.* at 669.

71. 428 U.S. 52 (1976).

minor's constitutional right to obtain an abortion free from state interference.[72] However, the Court undercut this holding considerably by later upholding the constitutionality of a Utah parental notification statute.[73] The Supreme Court's inconsistent decisions appear to reflect an attempt to balance the child's interest in obtaining an abortion with the parents' interest in controlling their child's actions.[74]

The Supreme Court also had trouble balancing the interests of minors and parents in the context of civil commitment to psychiatric care facilities. Although adults are entitled to an adversarial hearing prior to civil commitment, the Court held that an adversarial hearing is not required before a minor is involuntarily committed to an inpatient psychiatric facility.[75] The Court explained that a hospital's

---

72. *Id.* at 72-75. The Court invalidated the portion of a state law requiring blanket parental consent for minors, stating that minors are protected by the Constitution and that constitutional rights do not "magically" come into being solely upon reaching the age of majority. *Id.*

73. *See* H.L. v. Matheson, 450 U.S. 398, 413 (1981) (holding that a Utah statute that required physicians to notify the parents of a minor who was seeking an abortion was not unconstitutional as applied to an unemancipated girl who was living with and dependent upon her parents).

74. In addressing the issue of parental consent for abortion, the Court has stated that, "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." Bellotti v. Baird, 443 U.S. 622, 637 (1979). *See also* HOW OLD IS OLD ENOUGH?, *supra* note 30, at 50 (commenting that the inconsistent Supreme Court opinions regarding the independent rights of minors reflect disagreement among justices regarding the relative power of minors and their parents).

75. Parham v. J.R., 442 U.S. 584, 620 (1979). This suit was a class action brought on behalf of children in a Georgia state mental hospital. *Id.* at 587 n.2. The class challenged the admission procedures for minors. *Id.* at 587. The procedure for admission consisted of a signed application by a parent or guardian, observation of the child by hospital personnel, and a determination by the hospital superintendent on whether to admit the child to the facility. *Id.* at 590-91. The Court referred to the admission of a child to a psychiatric hospital as "voluntary," assuming that most parents who initiate such a process for their child have their child's best interests in mind. *Id.* at 602. The Court also noted that parents are in a better position to make such decisions because children lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* The Court stated that "[m]ost children, *even in adolescence*, simply are not able to make sound judgments concerning many decisions. . . ." *Id.* at 603 (emphasis added). In response to the concern that some parents act contrary to their child's best interest, the Court noted that this concern "creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602-03.

non-adversarial admissions procedures satisfy due process requirements because the Court assumed that parents who petition for their child's commitment are acting in the child's best interest.[76]

B. State Law and Children

Individual states have also addressed the legal capacity of minors. As with the Supreme Court decisions, state laws often treat the independent rights and responsibilities of minors inconsistently. In particular, state laws often impose adult criminal responsibility on delinquent minors but do not recognize non-delinquent minors' independent legal rights.[77]

The growing trend among states is to treat juvenile delinquents like adults. This trend reflects society's increasing demand for individual accountability[78] and its fear of violent youth crime.[79] Many

---

While parents have the right to commit their children for psychiatric treatment, the state has no duty to protect a child from a parent who does not have his child's best interest at heart. *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 194-97 (1989) (holding that a state has no constitutional duty to protect a child from an abusive parent even if the abuse is reported to local authorities). Another example of the inconsistent legal treatment of children can be found by comparing *Parham*, 442 U.S. 584 (1979) with Fare v. Michael C., 442 U.S. 707 (1979), discussed *supra* note 60. A minor is apparently competent enough to confess to murder, yet not competent enough to object to being committed to a psychiatric hospital. *See* Koocher, *supra* note 67, at 724-35 (discussing the inconsistencies in Supreme Court opinions addressing a child's independent legal rights).

The inconsistency of the two opinions cited above is particularly perplexing in light of the relevant population: Children who are processed through the juvenile justice system because of delinquency are often the same children who end up in psychiatric hospitals and residential treatment centers. *See* Ira M. Schwartz, *Does Institutional Care Do More Harm Than Good?*, *in* CONTROVERSIAL ISSUES IN CHILD WELFARE 275, 276 (Eileen Gambrill & Theodore J. Stein eds., 1994) (describing the boundaries of juvenile justice and mental health institutions as "porous").

76. *Parham*, 442 U.S. at 607. For a criticism of the *Parham* decision and the Court's underlying assumptions regarding children and their families, see Gary B. Melton, *Family and Mental Hospital as Myths: Civil Commitment of Minors*, *in* CHILDREN, MENTAL HEALTH, AND THE LAW, *supra* note 6, at 151.

77. *See infra* notes 80-82 and accompanying text.

78. *See, e.g.*, Peter Annin, *'Superpredators' Arrive: Should We Cage the New Breed of Vicious Kids?*, NEWSWEEK, Jan. 22, 1996, at 57 (discussing a new generation of teenagers, called superpredators, who are extremely violent). For a discussion of the response by states to the growing public concern about violent minors, see Feld I, *supra* note 20, at 842-45

states are gradually moving away from the *parens patriae* approach and are treating delinquent minors like adult criminals.[80] Additionally, other states now impose harsher penalties on minors who commit crimes.[81]

(discussing how recent amendments to the purpose sections of state juvenile codes reflects the de-emphasis of the rehabilitation role of the juvenile court and emphasizes the need for accountability and public safety). *See also* Tinkler, *supra* note 25, at 477 n.69 (providing examples of state juvenile code purpose sections that emphasize public safety over youth rehabilitation).

79. National statistics suggest that violent youth crimes have dramatically increased over the last decade. According to statistics compiled by the FBI, the rate at which children between the ages of fourteen and seventeen committed murder increased 160% from 1984 to 1991. SNYDER & SICKMUND, *supra* note 5, at 56 (citing FBI statistics from 1976 to 1991). However, juveniles are generally responsible for more property crimes than violent crimes. *Id.* at 48 (citing FBI statistics).

Illinois provides an example of a state's response to the public's fear of youth violence. Illinois quickly changed its juvenile laws in 1994 to allow for the incarceration of younger offenders after the sensational murder of a 5-year-old boy. Don Terry, *Prison for Young Killers Renews Debate on Saving Society's Lost*, N.Y. TIMES, Jan. 31, 1996 at A1. The Chicago boy was dangled out a window by two other boys, ages 10 and 11, and dropped to his death. *Id.* Ironically, Chicago, the "birthplace of juvenile justice," HOW OLD IS OLD ENOUGH?, *supra* note 30, at 40, has now become the national symbol of a new breed of violent offenders. *World News*, *supra* note 9. *See also* Annin, *supra* note 78, at 57 (discussing the "new breed" of violent youth in America).

It is important to note that while homicide rates have increased for juveniles, juveniles are still only responsible for 8% of all murders, 13% of all rapes and robberies, and 11% of all aggravated assaults. *Id.* So although it is true that juvenile crime has increased in the last ten years, adults are still committing the vast majority of violent crimes in the United States. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN YEARBOOK 57 (1995).

80. *See supra* notes 5-7 and accompanying text. For additional examples of recent legislation reflecting this national trend toward more punitive treatment of juveniles, see Juvenile Justice Act of 1995, ch. 95-267, § 14, 1995 Fla. Sess. Law Serv. 1833, 1846 (West) (codified at FLA. STAT. ANN. § 39.052(4)(a) (1996)) (requiring that a child of any age who is indicted for a crime punishable by death or life imprisonment be tried and sentenced as an adult); S.H.B. NO. 7025, P.A. 95-225, § 13, 1995 Conn. Legis. Serv. 648, 656 (West) (codified at CONN. GEN. STAT. ANN. § 46(b)-127 (West 1995)) (expanding mandatory transfer to criminal court of minors to cover C and D felonies); Act No. 797, 1995 Ark. Adv. Legis. Serv. 127, 173-74 (Michie) (codified at ARK. CODE ANN. § 9-27-318(b)(4) (Michie 1995) (allowing for transfer to criminal court of minors who qualify as "habitual juvenile offenders"); 1995 Or. Laws ch. 422, § 58.161.290(1) (lowering the age of criminal responsibility from 14 to 12 years old).

81. *See, e.g.*, TEX. FAM. CODE ANN. § 59.003-.010 (West 1996). In 1996, Texas adopted a specific set of "sanction levels" that apply to juveniles who commit delinquent acts, with the severity of the sanction corresponding to the gravity of the offense. *Id.* For example, a capital

Yet, while states begin to de-emphasize the importance of age in regard to criminal responsibility, states continue to rely on the age of juveniles when limiting their exercise of rights commonly enjoyed by adults. For example, states commonly designate a minimum age before a person can drink alcohol, drive a car, or get married.[82]

In spite of the inconsistencies of state and constitutional law, one fact remains consistent: delinquent youths are far more likely to be held to adult standards of responsibility than non-delinquent youths. In fact, the degree of adult responsibility imposed on a delinquent youth is directly related to the level of violence he displays in his

---

felony is assigned sanction level seven. *Id.* § 59.003. Sentencing guidelines for a level seven crime include up to ten years of confinement in a residential program. *Id.* § 59.010.

82. Forst & Blomquist, *supra* note 27, at 371. The authors illustrate this point by examining California's age requirements for such activities. A minor can work at 15; drive at 16; marry, vote and join the army at age 18; and purchase alcohol at 21. *Id.* Gradually granting rights to minors is premised on the idea that minors are in a transitional stage during which their maturity level is developing. *Id.* These age requirements are reflections of a person's gradual development into adulthood and of the balancing of state and parental interests. HOW OLD IS OLD ENOUGH?, *supra* note 30, at 45.

An illustration of the chaotic nature of the law's approach to children can be found by comparing state law regarding criminal responsibility to state law regarding a child's competence to be a witness. For example, in Missouri, a child under the age of ten years old is incompetent to testify except in situations where the child is a victim of specific crimes of sexual abuse. MO. REV. STAT. § 491.060(2) (1996). But at the same time, it is now possible for a child under the age of ten to be transferred to a court of general jurisdiction and tried as an adult. *Id.* § 211.071.1. These laws suggest that a nine-year-old cannot give reliable testimony in a court of law but can, conceivably, form the requisite *mens rea* for a crime such as first degree murder. *See also* Koocher, *supra* note 67, at 724-25 (discussing the inconsistencies in Supreme Court opinions addressing independent legal rights of children).

The Supreme Court has addressed the inconsistency of state law age requirements for exercising various rights. In Thompson v. Oklahoma, 487 U.S. 815 (1988), the Court recognized the minimum age requirements for serving on a jury, driving a car, getting married, purchasing pornographic material, and gambling. *Id.* at 824. The Court acknowledged that state legislation designating minimum age requirements for these activities is justified because minors are "not prepared to assume the full responsibilities of an adult." *Id.* at 825. The Court characterized these age requirements as a reflection of the difference in legal capacity between an adult and a child:

> [State age requirements] reflect[] this basic assumption that our society makes about children as a class; we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions.

Id. at 825 n.23.

delinquent acts.[83] When the legal status of children is examined in whole, the unsettling result of these inconsistent policies is that children are considered most competent when they are most delinquent.

III. THE QUESTION OF COMPETENCE

Any discussion of children's legal rights requires consideration of a child's ability to exercise the rights and responsibilities possessed by adults. The doctrine of *parens patriae* operates on the presumption that minors are not legally competent and therefore, in the absence of parental guidance, must be protected and guided by the state.[84] But the issue of a minor's competence to handle adult rights and responsibilities is not easily resolved, and many scholars examine a child's competence from both psychological and legal perspectives.[85]

From a psychological perspective, researchers have conducted substantial research to determine the limits of children's capacity for making decisions.[86] While young children clearly have diminished decisionmaking abilities,[87] most of this research suggests there is little, if any, difference between the capacity of an adolescent and an

83. For example, in Missouri, a waiver hearing is *mandatory* for youth accused of most violent crimes, regardless of the child's age. MO. REV. STAT. § 211.071.1 (1996). Yet a waiver hearing is only *discretionary* for all other crimes, and only available for children age 12 and older. *Id.*

84. *See supra* notes 26, 33-34 and accompanying text.

85. *See, e.g.*, Koocher, *supra* note 67, at 714-15 (using a developmental psychology approach to examining the ability of children to make competent decisions); Federle, *supra* note 17, at 987-1011 (discussing the "capacity" of minors as the historical determinant of legal rights); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 448-50 (1984) (discussing children's competence from a psychological perspective and the implications for independent legal rights).

86. Melton, *supra* note 85, at 462-66. Professor Melton summarizes an example of a well-designed study in which 9-, 14-, 18-, and 21-year-old participants responded to hypothetical situations involving decisions about medical and psychological treatment. *Id.* at 463. The responses were evaluated based on "evidence of a choice; understanding of the facts; reasonable decision-making process; [and] reasonable outcome of choice." *Id.*

87. *Id.*

adult to make decisions.[88]

To some degree, the competence of any decision lies in the eye of the beholder. Whether a decision is "good" or "bad" often depends on the evaluator's personal opinion.[89] However, researchers generally agree that by the age of fourteen a child typically has as much ability to make a competent decision as an adult does.[90]

A basic understanding of child development can help clarify how age and cognitive development affect a child's decisionmaking capacity. Jean Piaget, a renowned child developmental psychologist, developed a model of cognitive development that ends with a final stage called the "period of formal operations."[91] The "period of formal operations" which marks the development of the ability of children to deal with the abstract, to hypothesize, and to contemplate risks and future consequences[92] of their actions, is usually reached

---

88. *Id.* In fact, Professor Melton suggests that even young children, if given the opportunity, tend to make decisions that will not cause them harm. *Id.*

The case of Larry Champagne III illustrates Professor Melton's point. Larry is a St. Louis boy who found himself on a runaway school bus when the driver suffered a stroke. Carolyn Bower, *Boy Wonder; 5th-Grader Stops Bus After Driver Collapses,* ST. LOUIS POST-DISPATCH, Oct. 4, 1995, at 1A. Although only 10 years old, Larry made the decision to run to the front of the bus, take over the wheel, and hit the brakes, saving the lives of twenty other children. *Id.*

See also Richard E. Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment,* 50 WASH. & LEE L. REV. 695 (1993). This article summarizes research that suggests children are capable of making decisions about their own mental health treatment. *Id.* at 708-09. Furthermore, this research suggests that treatment is more successful when children are able to participate in treatment decisions. *Id.* The author emphasizes the fact that children do not necessarily have to be logical in all respects to exhibit rational decisionmaking capacity. *Id.* at 716. In addition, the author states that "even adults typically will not demonstrate perfect competence." *Id.*

89. *Id.* at 716-17. The author emphasizes that no person is capable of completely rational decisionmaking. *Id.* He asserts that the relevant inquiry is what capacities adults use when making a decision and whether the child in question has similar capacities. *Id.*

90. Melton, *supra* note 85, at 463; Redding, *supra* note 88, at 708. *See also* LAURENCE HOULGATE, THE CHILD AND THE STATE: A NORMATIVE THEORY OF JUVENILE RIGHTS 61-74 (1980) (discussing that by age fourteen an adolescent has the capacity to make a rational choice, whether or not he chooses to exercise it).

91. HOW OLD IS OLD ENOUGH?, *supra* note 30, at 27-29. *See also* JOHN H. FLAVELL ET AL., COGNITIVE DEVELOPMENT 131 (1993) (summarizing Piaget's categorization of childhood into stages of development).

92. HOW OLD IS OLD ENOUGH?, *supra* note 30, at 29. Piaget conducted research with

before age fourteen.[93] Piaget's theory is reflected throughout history, as indicated in different societies by the designation of the age of fourteen to signify important rites of passage.[94]

From a legal perspective, a child's ability or inability to make competent decisions relates directly to the issue of criminal responsibility. The historical justification for relieving children of criminal responsibility was the belief that children were unable to make competent decisions.[95] At common law, a child's immaturity and lack of competence was the basis for the irrebuttable presumption that a child under the age of seven was not capable of forming the

---

much younger children as well, studying their ability to apply ideas of intentionality to hypothetical situations. Lois A. Weithorn, *Children's Capacities in Legal Contexts, in* CHILDREN, MENTAL HEALTH, AND THE LAW, *supra* note 6, at 30. His research in this area suggests that children as young as 10 are able to connect the concept of intentionality to "naughtiness." *Id.* However, the study has been criticized because the hypothetical situations were rather vague. *Id.* Furthermore, this research does not adequately address a child's ability to predict the consequential events of any particular course of action. *Id.* at 31. *See also* HUGH ROSEN, PATHWAY TO PIAGET 23 (1977) (quoting Piaget's proposition that most children reach the formal operation period between the ages of 11-12 and 14-15, or at most by between 15 and 20 years of age).

93. HOW OLD IS OLD ENOUGH?, *supra* note 30, at 28. *See also* Koocher, *supra* note 67, at 715-18. The authors describe a child's ability to make competent decisions from the perspective of his socialization, his grasp of time, and his ability to manipulate concepts. "[Age 14 is a] good landmark age for the expectation by society that children use abstract reasoning skills, and thus, that they be given increased responsibility." HOW OLD IS OLD ENOUGH?, *supra* note 30, at 29.

94. HOW OLD IS OLD ENOUGH?, *supra* note 30, at 7. For example, minors generally reach puberty by the age of 14. *Id.* at 9. In addition, in the 17th century, marriage was common at age fourteen. *Id.* Spiritual maturity is also considered to arrive by age 14 in both the Christian and Jewish faiths. *Id.* Furthermore, compulsory education ended at age 14 until the 1930s. *Id.* at 11. In the 18th century, the age for apprenticeship was 14. *Id.* at 12.

95. *See supra* notes 17-19, 26 and accompanying text. The historical rationale for the presumption of incompetence in young children parallels the rationale of the insanity defense. Weithorn, *supra* note 92, at 27. In order to rebut the presumption of incompetence, the state had to prove that the child understood the nature of his actions and could sufficiently distinguish right from wrong. *Id.* The requirement that a child have the capacity to appreciate the wrongfulness of his actions before any criminal liability is imposed reflects the same policy as does the insanity defense: that those incapable of distinguishing between right and wrong and of appreciating the nature of their actions are not morally culpable and should not be held criminally responsible. *Id.*

requisite *mens rea* to commit most crimes.[96] Between the ages of seven and fourteen this presumption was rebuttable, and after age fourteen courts afforded children the same criminal responsibility as adults.[97]

IV. ENOUGH IS ENOUGH: DRAWING THE LINE FOR CRIMINAL RESPONSIBILITY

It is well-established that children's competence and decisionmaking abilities are not the same as adults.[98] Because every individual develops at his own pace, any attempt to make children's legal rights and responsibilities correspond to age-related developmental capacities will never be precise. However, the present inconsistencies between trends in juvenile criminal responsibility and legal rights for non-delinquent children are at least intellectually disturbing and, in some cases, even morally questionable.[99]

But what are the alternatives to the present system? If the system grants minors full and complete legal rights to correspond to their level of criminal responsibility, one might imagine scenes of nine-year-olds driving cars and drinking alcohol.[100] On the other hand, the

---

96. Weithorn, *supra* note 92, at 26.

97. *Id.* at 27.

98. The Supreme Court has emphasized this point on several occasions. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988) ("Children, by definition, are not assumed to have the capacity to take care of themselves.") (quoting Schall v. Martin, 467 U.S. 253, 265 (1984)).

99. Forst & Blomquist, *supra* note 27, at 373.

> As a result of recent reforms, youthful offenders are being asked to bear the liabilities of the two worlds between which they stand—childhood with its attendant dependency and immature judgment but without its protections and nurturance—and adulthood with its attendant obligations and responsibilities, but without its freedoms and independence.

Id. at 330.

100. For a discussion of what a world of "liberated children" would look like, see LAURA M. PURDY, IN THEIR BEST INTERESTS? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 124-49 (1992). For example, would children be able to move out of their parents' home? *Id.* at 129-30. Alternatively, would parents be able to move out and leave the children? *Id.* How would

dramatic increase in youth crime and violence has dissuaded courts and legislators from reducing juvenile criminal responsibility.[101]

Some commentators argue that all persons should be given a rebuttable presumption of competence.[102] Under this approach, children of any age would be presumed competent to be responsible for their actions unless they could establish that they are incompetent.[103] However, this author believes that a presumption of competence for all children does not truly address whether children of any age may be competent. Instead, this approach ignores the question of true competence in order to assuage society's fear of youth violence and to satisfy public demand for punishment by making it easier for courts to impose criminal responsibility on children.[104] And considering public sentiment and media

---

family issues such as homework, sex, dress, and drugs be resolved? *Id.* at 142. Much of Professor Purdy's book illustrates the tension between parental rights to raise children and a child's independent right to self-determination.

101. SNYDER & SICKMUND, *supra* note 5, at 58. There is evidence that the juvenile crimes are of a much more violent nature than ever before. For example, the use of firearms by juvenile homicide offenders has nearly tripled since 1983. *Id.* In addition, one quarter of all serious crimes committed in 1991 involved at least one juvenile offender. *Id.* at 47. Furthermore, many juveniles report carrying a gun all or most of the time, *id.* at 53, and most juveniles report having broken the law before the age of 18. *Id.* at 49. Overall, juveniles were responsible for approximately one out of every five violent crimes committed in 1991. *Id.* at 47.

102. *See* Hillary Rodham, *Children's Rights: A Legal Perspective, in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21, 33 (Patricia A. Vardin & Ilene N. Brody eds., 1979) ("The first thing to be done is to reverse the presumption of incompetency and instead assume all individuals are competent until proven otherwise.").

103. *Id.* Ms. Rodham (now Rodham-Clinton) acknowledges that the implementation of this proposal could be difficult, but no more difficult than implementing other areas of legislation. *Id* at 33-34. Also, Ms. Rodham proposes this presumption of competence within the context of a discussion about juvenile justice and the apparent lack of personal responsibility youths feel. *Id.* She does not elaborate on how this presumption of competence would affect non-delinquent youth. *Id.* at 34.

104. Ms. Rodham has, in fact, received significant criticism for her proposal to presume a child competent until proven otherwise. The criticism, however, has primarily come from political conservatives, who are concerned with giving children excessive freedom: "'[Ms. Rodham] believes kids should be able to sue their parents rather than helping with the chores they were asked to do.'" Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 269 (1995) (citation omitted).

With regard to proposals of such sweeping reforms as the one articulated by Ms. Rodham, it is important to consider the era in which they were constructed. The most radical children's

sensationalism,[105] it is difficult to envision a situation in which a minor charged with a violent crime would be able to overcome the presumption of competence.[106]

The presumption of competence approach also fails if granted to non-delinquent children as well as juvenile delinquents. Parental interests in the upbringing of their children would be ignored if all children are presumed competent. For example, if an eleven-year-old is presumed to be competent and decides she wants to quit school, her parents must prove she is not competent to make that decision. At eleven years old, the child might be capable of competent decisionmaking, but that does not necessarily mean she will make mature decisions.[107]

Other commentators have proposed that age eighteen should constitute the age at which people are considered legally competent for purposes of criminal responsibility.[108] However, this approach ignores well established psychological research demonstrating that a

---

law reform proposals followed on the heels of the civil rights movement. Scholars attempted to classify children as a group in need of liberation, just as racial minorities and women had been a few years earlier. For a discussion of this "children's liberation movement" and its most radical theorists, see Minow, *supra*, at 268-78. For a response to the "children's liberation movement," see generally PURDY, *supra* note 100, at 144-49 (detailing why the extension of full legal rights to minors would be dangerous and disastrous).

105. *See, e.g.*, Annin, *supra* note 78 (discussing a "new breed of vicious kids"); *World News*, *supra* note 9 (discussing state measures taken to combat the problems of youth violence). *See also* Smith, *supra* note 6, at 953-61 (1995) (citing several inflammatory and sensational new headlines, describing youth violence in epidemic proportions).

106. Illinois is a good example of this point. In response to the horrifying murder of a five-year-old by a 10- and 11-year-old, Illinois amended its juvenile laws to allow for younger children to be sent to juvenile prison and/or waived into criminal court. *See* Terry, *supra* note 79, at A1.

107. Melton, *supra* note 85, at 465-66 ("[T]hat children have the *capacity* to perform competently and responsibly does not mean that they will exercise such maturity of judgment, particularly when the decision is made under circumstances of great stress or when social norms elicit undesirable behavior.") *See also* HOULGATE, *supra* note 90, at 68 (distinguishing a child's ability to make a rational decision from his willingness to do so).

108. Smith, *supra* note 6, at 989. Professor Smith urges that children should not be transferred to criminal court: "Kids who commit crimes are kids. The mere fact that an 11-year-old—or even a 17-year-old—commits a crime does not suddenly transform that child into an adult." *Id.*

child's cognitive and moral capacities often enable him to accept criminal responsibility for his action at a younger age.[109] Moreover, delaying criminal responsibility until age eighteen fails to adequately address public interest in punishment and deterrence of violent crimes committed by juveniles.[110]

Because of the substantial research demonstrating that an average adolescent is capable of making competent decisions,[111] and the state interest in protecting society,[112] there is justification for holding adolescents criminally responsible for their illegal actions. However, holding very young children criminally responsible may not actually protect society from crime. In fact, doing so may cause greater harm to society because children who are incarcerated during their developmental years will likely return to society more violent than when they were first incarcerated.[113]

Based on the psychological information currently available regarding the cognitive and moral development of children,[114] the age of fourteen represents an age at which most children are able to exercise reasoning and decisionmaking skills on par with adults.

---

109. *See supra* notes 86-94 and accompanying text.

110. Professor Smith does propose that longer confinement be imposed on youth who commit crimes. Smith, *supra* note 6, at 1020. However, the length of proposed juvenile confinement does not come near the length of traditional sentences available in criminal court. *Id.*

111. *See supra* notes 86-90 and accompanying text.

112. *See supra* notes 78-81 and accompanying text.

113. *World News*, *supra* note 9. David Lambert, of the National Center for Youth Law commented on the two Illinois boys sent off to prison: "There is certainly a likelihood that these two young offenders will emerge from this maximum security penitentiary even more violent than they went in." *Id.*

See also Forst & Blomquist, *supra* note 27, at 374 ("[An incarcerated child] forgoes . . . the period of semi-responsibility and training for her adult life. . . ."); Smith, *supra* note 6, at 1008-09 ("[A]ddressing crime by simply increasing punishment simply doesn't work. Though we are now locking more kids up than ever before and are doing so for longer and longer periods, the juvenile crime rate has not been affected."). Professor Smith describes a study conducted in the early 1970's which suggests that children who are incarcerated not only continue to break the law but also end up committing more serious crimes than other delinquents. *Id.* at 1009.

114. *See supra* notes 86-94 and accompanying text.

Therefore, this author proposes that children over the age of fourteen be given a rebuttable presumption of competence.[115] Because the majority of children are capable of adult-like decisionmaking by the age of fourteen,[116] the burden of proving incompetence should fall on the defense. Furthermore, because the majority of juvenile delinquents are over age fourteen,[117] this approach satisfies concerns about public safety without subjecting younger children to criminal responsibility beyond their level of competence.

Likewise, based on current psychological information, children below age fourteen should be afforded a rebuttable presumption of incompetence. States should return to an individualized approach,[118] based on psychological information regarding the child's cognitive development. A child's individual level of cognitive development serves as a better indicator of his criminal culpability than does the severity of his crime.[119]

Evidence regarding the cognitive capacity of typical fourteen-year-olds applies equally to non-delinquent minors.[120] However, society's ability to afford legal rights and responsibilities to non-delinquent adolescents is complicated by parental interests in childrearing. The fact that a child is capable of making good

---

115. The presumption of competence or incompetence should be rebuttable to allow for an individual's personal rate of development. *See* Forst & Blomquist, *supra* note 27, at 365 (discussing the varying degrees of moral culpability of youth and proposing that courts could apply the concept of diminished capacity to minors charged with crimes).

116. *See supra* note 90 and accompanying text.

117. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILES TAKEN INTO CUSTODY: FISCAL YEAR 1992 A-7 to A-9 (1995). For both delinquency and status offenses, children ages 14 and older comprise the vast majority of minors detained in the sample years of 1986 and 1990. *Id.*

118. *See supra* note 5 (describing the traditional process of waiver before to recent reforms).

119. *See* Smith, *supra* note 6, at 989-91 (discussing the irrelevance of the particular crime committed to whether a minor has the legal capacity and moral culpability necessary to be held criminally responsible as an adult). *See also* Forst & Blomquist, *supra* note 27, at 364 ("[M]oral condemnation follows from the assumption that the criminal, having free will, knowingly and consciously chooses to violate the law.").

120. *See supra* notes 86-94 and accompanying text.

decisions does not necessarily guarantee that she will *actually* make good decisions.[121] Because society places significant responsibility on parents for the actions of their children outside the criminal context, allowing children too much freedom to make decisions adverse to their parents' interest is unwise. Accordingly, society must exercise caution in affording complete legal rights and responsibility to minors.

However, there should be a point at which society begins to rely on adolescents' abilities to make competent decisions. Therefore, a non-delinquent adolescent over the age of fourteen should also be presumed to be competent. Parental interests should be weighed against this presumption and adjustments in adolescents' rights made appropriately.[122] And when no parental interest is involved, the judgment of non-delinquent children over the age of fourteen should be given even greater weight.[123]

Drawing the line for criminal responsibility at age fourteen does not guarantee an end to juvenile crime. But it does provide a safeguard against "knee-jerk" responses[124] to media sensationalism

---

121. *See supra* notes 88-89 and accompanying text.

122. This author acknowledges that many scenarios exist in which a fourteen-year-old may be capable of rational decisionmaking, yet parental interests directly conflict with the exercise of the child's decision. For example, a child may have the psychological and cognitive capacity to decide to quit school. However, the parental (and state) interest in educating the child so that she becomes a self-sufficient adult is generally strong enough to outweigh the child's interest in quitting school. But, in fact, in many districts children are allowed to legally quit school at age sixteen or seventeen. Because a child of that age is more capable of supporting herself, the parental interest is arguably weaker. In this way, child and parental interests are already balanced by state law.

123. The Supreme Court has acknowledged that the absence of a parental interest may alter the weight given to a child's opinion. *See* Parham v. J.R., 442 U.S. 584, 619 (1979) (leaving open the question of whether hospital admission of wards of the state should be handled any differently than children who have parents). *See also* Koocher, *supra* note 67, at 720-23 (questioning the objectiveness of mental health personnel at profit-making hospitals and the wisdom of allowing such broad discretion in admittance criteria for minors, especially those minors without an involved parent).

124. Schlinkmann & Bell, *supra* note 4, at 2B (quoting Kimberly Kempf Leonard, a criminologist at the University of Missouri at St. Louis: "[The new juvenile laws are] a knee-jerk reaction to appease public concern.").

and public panic.[125] There is also no guarantee that weighing parental interests against a non-delinquent adolescent's competence will provide a solution to every conflict between child and parental interests. It does, however, ensure that the law will recognize an adolescent's emerging independence and give it the weight it deserves. Furthermore, it protects an adolescent's legal rights when he is "good," not just when he is "bad."

CONCLUSION

> *The more important, indeed the vital thing, is to prevent the children from reaching that condition in which they have to be dealt with in any court, and we are not doing our duty to the children of to-day, the men and women of to-morrow, when we neglect to destroy the evils that are leading them into careers of delinquency, when we fail not merely to uproot the wrong, but to implant in place of it the positive good. . . . The work demands the united and aroused efforts of the whole community, bent on keeping children from becoming criminals, determined that those who are treading the downward path shall be halted and led back.*[126]

There are no easy answers to the growing problem of juvenile crime. But today's trend of lowering the age of criminal responsibility has not proven effective.[127] Given the available information on a child's cognitive development,[128] this trend is also morally unsound. Furthermore, the presumptions that society is willing to make regarding a delinquent child's legal capacity are not consistent with the presumptions made regarding non-delinquent children.

---

125. *See supra* note 80.

126. Mack, *supra* note 15, at 122.

127. *See supra* note 113.

128. *See supra* notes 86-94 and accompanying text.

Regardless of the current statistics on juvenile crime, it is time to draw the line. And the line should be drawn evenly for delinquent and non-delinquent children. Although drawing the line at age fourteen will not solve the problem of juvenile delinquency, it will provide a consistent degree of expectation and privilege for minors. The problems of juvenile delinquency and violent youth crime cannot be meaningfully addressed until we refocus on the underlying causes of juvenile delinquency and provide our children with guidance instead of punishment.

Jacqueline Cuncannan[*]

---

* M.S.W. 1994, Grand Valley State University; J.D. 1997, Washington University.